Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-101354-001 DT 08/28/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

PHILIP JACOB WERLY (001)

ANDREA L KEVER

C DANIEL CARRION

ARROWHEAD JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2013–101354.

Defendant-Appellant Philip Jacob Werly (Defendant) was convicted in Arrowhead Justice Court of driving under the influence. Defendant contends the trial court erred in denying his motion for mistrial based on his claim that the witnesses improperly testified Defendant was impaired. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On January 9, 2013, the State filed a Complaint charging Defendant with driving under the influence, A.R.S. § 28–1381(A)(1). Prior to the start of testimony in this matter, the trial court (Judge *pro tem* David H. Fletcher) stated that "no witness should testify that the Defendant was impaired." (R.T. of Apr. 11, 2014, at 12.)

The State first presented the testimony of Detective James Waltermire. (R.T. of Apr. 11, 2014, at 40.) Detective Waltermire testified Defendant drove 74 to 76 miles per hour in a 65 mile-per-hour zone, weaved in and out of traffic, cut in front of other drivers, drove with his right side tires over the fog line for approximately ½ mile, and braked abruptly once Detective Waltermire activated his emergency lights. (*Id.* at 48–50.) Once Detective Waltermire approached Defendant, he noticed Defendant's face was flushed, his eyes were bloodshot and watery, his pupils were very dilated, and there was an "overpowering" odor of synthetic cannabinoid coming from Defendant's vehicle. (*Id.* at 50–51, 91.) Detective Waltermire gave Defendant some field sobriety tests with the following results: walk and turn, six of eight cues; one leg stand, two of four cues; Romberg, five of seven cues; finger to nose, five of eight cues; finger count, no issue; Romberg balance, two cues. (*Id.* at 70–80.) During cross-examination, Detective Waltermire said he asked Defendant to rate himself on a scale of zero to 10, and when Defendant's attorney asked if Defendant "told you zero,

completely sober," the transcript indicates "no audible response." (*Id.* at 101.) During Detective Waltermire's direct and re-direct examination, the trial court sustained five of Defendant's attorney's objections, twice when Defendant's attorney stated the objection was "foundation," twice when Defendant's attorney stated nothing more than "objection," and once when Defendant's attorney stated nothing more than "objection" and the trial court stated "nonresponsive." (*Id.* at 55, 63, 82, 127, 129.)

The State then presented the testimony of Officer Derek Smith. (R.T. of Apr. 11, 2014, at 134.) During that testimony, the following exchange occurred that led Defendant's attorney to make a motion for mistrial:

> By [Prosecutor]: . . . But how many DRE evaluations have you done?
>
> A. Fifty-four.
>
> Q. And you have to enter the results of each one of those into what's now a national database?
>
> A. Yes.
>
> Q. In order to keep your certification, do you have to have a certain accuracy level?
>
> [Defendant's attorney]: Objection, relevance.
>
> THE COURT: Overruled.
>
> THE WITNESS: I—
>
> BY [Prosecutor]: You don't—just asking if you do. You—
>
> A. I have—all mine that I have gotten results back for on all my cases, I have an 88 percent accuracy—
>
> [Defendant's attorney]: Judge, objection.
>
> THE COURT: Nonresponsive.
>
> [Defendant's attorney]: Object to the relevance.
>
> THE COURT: The question to you was, is there a standard? You can answer that question, if you know.
>
> THE WITNESS: There's a standard. Eighty percent.
>
> BY [Prosecutor]: Do you have to keep your accuracy level above that standard to maintain your certification?
>
> [Defendant's attorney]: Judge, I'm going to object to any further testimony about his—officer's accuracy.
>
> . . . .
>
> (Jury out at 4:01 p.m.)
>
> THE COURT: All right. Thanks.

[Prosecutor]: Judge, I think we're getting a little ahead of ourselves. I don't want Officer Smith to tell me what it is. I just want him to tell the jury that he does have to maintain a certain accuracy.

THE COURT: Yes, and he was nonresponsive to that question. What he said was, "I have an 88 percent accuracy rate," instead of responding to your question, "Is there a rate?"

[Prosecutor]: And we struck that and he said yes and then—his next response, I believe, was going to be, "Yeah, I do and it's above that."

THE COURT: Right.

[Prosecutor]: But he wasn't going to say what it was.

. . . .

[Defendant's attorney]: It's too late to say what they were trying to do.

THE COURT: Well, I sustained your objection.

[Prosecutor]: Well, let's let him do it, and then you can object. But he was in the middle of responding.

[Defendant's attorney]: Okay. Object to any admission, mistake or not, any admission of any testimony as to accuracy of his DRE. It's not appropriate for—for HGN, for example, you have to have remain your—keep your certification. But you don't get to admit that, "Hey, I'm 90 percent accurate," unless the door is open somehow.

[Prosecutor]: And again, Your Honor, the State is not trying to—

[Defendant's attorney]: Judge, can I please make my record.

[Prosecutor]: —seek his percentage. He just—we just want to know if he has to maintain an accuracy and if he does in fact do that.

THE COURT: All right. If you could remain silent for the next two minutes. Go ahead.

[Defendant's attorney]: Thank you, Judge. So I'm not trying to say the State [tried] to elicit it, but it's out. And now we have the problem. Stricken or not and jury disregarded or not, we have the problem with the prior witness of three times relating to that the Defendant was impaired or in my opinion is impaired. Every time sustained. Jury disregard it. Now we have a witness saying, again, forget about how it came out. But now we have it in front of the jury that, "I'm 88 percent accurate, you know, in my opinions and my work. And it has to be 80 percent. I'm above that." It's completely inappropriate. These are all questions that relate to—

THE COURT: Well, I don't think it was any misconduct on the part of the State, though.

[Defendant's attorney]: I'm not saying there was. I'm not saying there was.

THE COURT: It was nonresponsive to her question. And I sustained your objection to it.

[Defendant's attorney]: I understand, Judge. But still, because it's out—

THE COURT: You can't un-ring the bell.

[Defendant's attorney]: —it's the fourth time.

THE COURT: I understand the concept.

[Defendant's attorney]: Well, I'm going to ask for a mistrial, judge, because now it's the fourth time there's evidence in front of the jury that's going to be asked to be stricken. And we just can't keep doing that. And I'm not saying it's the State's fault. All right. I'm just saying—

THE COURT: Yeah. For the judge that might listen to this on appeal someday, I consider that every time that there was misconduct by the State, it was always the officer. It was not—it was non—it was a non-responsive response to the State's attorney's question. So every time it was improper, it was a—I think it was a surprise to the State, just as it was a surprise to me and you.

[Defendant's attorney]: I'm not disagreeing.

THE COURT: Yeah.

[Defendant's attorney]: And I didn't start my record by suggesting it was [the Prosecutor's] fault or that she intended to do that. But it's still been out there. At least four times, I've had to object to get it stricken and instructed to the jury. And this—it's too much at this point. . . .

THE COURT: All right.

[Defendant's attorney]: Again, not the fault of anybody. But that creates a severe problem for this—

THE COURT: Okay. You've made a motion for mistrial. Have you made the record on the—are you all—

[Defendant's attorney]: Yes.

THE COURT: Okay. State.

[Prosecutor]: . . . And as for the other basis, the nonresponsive answers the State's questions. As for that basis to the mistrial, I don't have a lot to add to what Your Honor has already said. The State is not intentionally eliciting this testimony. The State does not have any designs to sneak this information in front of the jury. Part of the problem is that yes, objections are abstained. [*sic*] The State attempts to rephrase. And the problem is unclear, because the Defense is not noting the basis of the objection. I'm not sure and the witness isn't sure what aspect of the testimony he's not allowed to say. So it's getting a little confusing. And the problem in this particular issue is that—

THE COURT: Well, for experienced officers, I am very surprised that they would put the conclusion of law that the Defendant is impaired. That—there's a Supreme Court decision telling me you can't do that.

[Prosecutor]: Well, and Your Honor, I don't—I think the problem is I don't think that that's what the detective was trying to do. And we have to keep in mind even, especially with Detective Waltermire, these officers are experienced, but they may not be in the field anymore. It may be a while—it may have been a while since they did a trial like this or did an investigation. So these are non-intentional. This is not info we're trying to sneak in front of the jury.

THE COURT: All right. The Defense motion for mistrial is presently denied. Back to the question that you can ask him which he was nonresponsive to is, is there is standard? Yes, the standard is 80 percent. I don't want him to go into this personal record on what he's done on other cases.

[Prosecutor]: And we're not even going there. Really, the testimony that I'm trying to elicit—and I think things just got a little hot, got a little confusing—is that yes, you have to maintain a certain standard. And yeah, I'm still certified, so I've maintained that standard.

THE COURT: Perfect.

. . . .

(Recess taken at 4:08 p.m., reconvening at 4:24 p.m.)

THE COURT: I think I'm ready for my jury again.

[Defendant's attorney]: Judge, wait, wait. Just to clarify your earlier ruling as far as the State's question and the officer's answer. I don't object to there being a standard and he's meeting it and he has a certification, or whatever. But the actual number saying the standard is 80 percent—

THE COURT: Yes, did you want me to tell the jury to disregard that or do you, you know, some Defense attorneys don't like to ring the bell twice but I'm willing to do that if you wish.

[Defendant's attorney]: I'd just ask that you disregard the officer's testimony and, you know, that whatever, that was objected to. It's just that generally—

THE COURT: Okay. I'll say that—

. . . .

(Jury in)

THE COURT: Thank you, you may be seated. . . Actually, one last thing. I want to instruct the jury that the last sentence that the officer said, you are to disregard it. The objection was sustained. And now you may proceed.

(R.T. of Apr. 11, 2014, at 143–53.)

After the presentment of the testimony, arguments, and instructions, the jurors found Defendant guilty of the charge. (R.T. of Apr. 14, 2014, at 253–54.) The trial court (Judge Craig William Wismer) later imposed sentence. (R.T. of Mar. 4, 2015, at 16–20.) On that same date, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION DENYING DEFENDANT'S MOTION FOR MISTRIAL.

Defendant contends the trial court erred in denying his motion for mistrial based on his claim that the witnesses improperly testified Defendant was impaired. Defendant appears to claim that it is improper for a witness ever to use the words "the defendant" and "impaired" in the same sentence or even the same paragraph. A review of the cases shows this is not what those cases hold.

In *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983), the defendant was charged with "per se" DUI (then BAC of 0.10 or more) and not "under the influence" DUI. 139 Ariz. at 593, 680 P.2d at 124. Among other arguments, Fuenning argued that "the court committed error in admitting evidence that he was 'under the influence' when he was charged only with a violation of subsection B for having a BAC of .10% or more." 139 Ariz. at 594, 680 P.2d at 125. The court first rejected Fuenning's claim that the evidence was not relevant in a *per se* DUI case:

> Defendant claims that the court erred in permitting, over appropriate objection, testimony regarding the manner in which he was driving, the manner in which he performed the field sobriety tests, and the videotape showing his behavior at the time he was booked and given the intoxilyzer test. Defendant argues that such evidence would be relevant to the question of whether a driver had violated subsection A of the statute by driving "while under the influence," but is irrelevant to the question of whether he violated subsection B by driving with a .10% or greater BAC.
>
> We disagree. Again, although the evidence is not conclusive, we feel it is relevant.

139 Ariz. at 599, 680 P.2d at 130. The court concluded "[e]vidence of defendant's conduct and behavior—good or bad—will be relevant to the jury's determination of whether the test results are an accurate measurement of alcohol concentration at the time of the conduct charged." 139 Ariz. at 599, 680 P.2d at 130.

The court next did not rule on Fuenning's claim about the language used:

> Defendant next complains that the court erred in admitting, over appropriate objection, expert evidence from police officers that at the time he was arrested defendant was "drunk," "intoxicated," and "under the influence." We acknowledge that, for the reasons described in the preceding paragraph, this evidence is also relevant. It is also an opinion of ultimate fact with regard to prosecutions under subsection A. The rules of evidence permit opinions on "ultimate issues." See Rule 704, ARIZ. R. EVID. However, Rule 403 gives the court discretion to exclude otherwise relevant evidence where its probative value is out-

> weighed by the danger of [unfair] prejudice. In a prosecution under subsection B, with no charge under subsection A, the jury might easily be misled or diverted from the only issue —the chemical level of blood-alcohol—by expert testimony containing commonly used phrases which indicate guilt of the crime not charged. Ordinarily, the probative value of such evidence in a "per se" case would be slight and the danger of prejudice great. ***We need not decide if the admission of this evidence was an abuse of discretion in the case at bench since we are forced to reverse on other grounds.*** However, we do urge trial courts to exercise a great deal of caution in the admission of opinion evidence of this type.

139 Ariz. at 599–600, 680 P.2d at 130–31 (emphasis added). At that point in the opinion, it appears the position of the Arizona Supreme Court was as follows:

> 1. In a *per se* DUI case, evidence that the defendant was "drunk," "intoxicated," or "under the influence" is relevant.
>
> 2. Such evidence is admissible under Rule 704.
>
> 3. In a *per se* DUI case, evidence that the defendant was "drunk," "intoxicated," or "under the influence" might mislead the jurors, thus trial courts should use great caution and consider excluding such evidence under Rule 403.

The court then issued a Supplemental Opinion and said the following:

> We are also asked to reconsider the portion of the opinion, including footnote 7, in which we advise trial courts to exercise caution in the admission of opinions that the defendant was "drunk," "under the influence" or "intoxicated." Numerous cases have been cited to this court in which such opinions have been held admissible. Most of these cases do not address the issue upon which we commented. Such opinion evidence is usually admissible, even though the opinion "embraces an ultimate issue" of fact, Rule 704, ARIZ. R. EVID. Notwithstanding that principle, opinion evidence is usually not permitted on how the jury should decide the case. See Comment to Rule 704, ARIZ. R. EVID.; *State v. Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982).
>
> In our view, ordinarily it would be neither necessary nor advisable to ask for a witness' opinion of whether the defendant committed the crime with which he was charged. When, in a DWI prosecution, the officer is asked whether the defendant was driving while intoxicated, the witness is actually being asked his opinion of whether the defendant was guilty. In our view, such questions are not within the spirit of the rules. See Rule 704 and Comment, ARIZ. R. EVID. Ordinarily, more prejudice than benefit is to be expected from this type of questioning. It ordinarily would be proper to ask the witness in such a case whether he or she was familiar with the symptoms of intoxication and whether the defendant displayed such symptoms. The witness might be allowed to testify that defendant's conduct seemed influenced by alcohol. However, testimony which ***parrots the words of the statute*** moves from the realm of permissible opinion which "embraces ***an***" issue of ultimate fact (Rule 704) to an opinion of guilt or innocence, which embraces all issues.

> This makes it easy for the jury to acquit or convict based on their empathy for the witness, rather than their consideration of the evidence. We see little to be gained and much risk from such methods. *Id.,* Rule 403, ARIZ. R. EVID.

139 Ariz. at 605, 680 P.2d at 136 (first emphasis added; second emphasis original). In analyzing *Fuenning,* this Court notes the following points: (1) The court was concerned with use of language such as "under the influence" when the defendant was charged only with *per se* DUI; (2) the court never discussed the words "impair," "impaired," or "impairment" and instead discussed only the phrase "under the influence"; (3) the court stated such language as "under the influence" was admissible under Rule 704; (4) the trial court should use discretion in determining whether to exclude such language under Rule 403; (5) language that "parrots the words of the statute" would move to "an opinion of guilt or innocence"; and (6) the court did "not decide if the admission of this evidence was an abuse of discretion in the case."

As might be expected, this decision of the Arizona Supreme Court caused some uncertainty with the Arizona Court of Appeals. In *State v. White,* 155 Ariz. 452, 747 P.2d 613 (Ct. App. 1987), the court held it was not permissible to admit testimony that the defendant was "under the influence," but it was permissible to admit testimony that the defendant exhibited symptoms of intoxication. 155 Ariz. at 456–57, 747 P.2d at 617–18. In *State v. Bedoni,* 161 Ariz. 480, 779 P.2d 355 (Ct. App. 1989), the court held it was not error for the officers to answer as follows:

> Q. Sergeant Martinez, did the defendant's conduct, the conduct that you observed, seem influenced by alcohol?
>
> A. It did.
>
> . . . .
>
> Q. Did it seem to you [Officer Manson] that the defendant's conduct was influenced by alcohol?
>
> A. It did.

161 Ariz. at 484–85, 779 P.2d at 359–60. In *State v. Lummus,* 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997), the court held it was not permissible for the officer to testify that the defendant was "ten plus" on a scale of 1 to 10. 190 Ariz. at 572, 950 P.2d at 1193. The dissent was, however, of the opinion that such testimony was permissible. 190 Ariz. at 572–73, 950 P.2d at 1193–94. In *State v. Herrera,* 203 Ariz. 131, 51 P.3d 353 (Ct. App. 2002), the court held it was not permissible for the officer to testify that the defendant was "impaired to the slightest degree." *Herrera* at ¶ 7. And in *State v. Campoy (Cordova),* 214 Ariz. 132, 149 P.3d 756 (Ct. App. 2006), the court held the trial court erred in precluding the witnesses from using such words as "impairment," "sobriety," "tests," "pass," "fail," "marginal," or "field sobriety test." *Campoy (Cordova)* at ¶¶ 3, 17. From these cases, it appears it is not proper for a witness to parrot the words of the statute, such as stating that the defendant was "under the influence of intoxicating liquor" or was "impaired to the slightest degree," but it would be proper to testify that the defendant appeared "impaired."

In assessing the trial court's denial of Defendant's motion for mistrial, an appellate court is obligated to affirm the trial court when any reasonable view of the facts and law might support the judgment of the trial court, even when the trial court has reached the right result for the wrong reason. *State v. Canez,* 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002); *State v. LaGrand,* 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *City of Phoenix v. Geyler,* 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985); *State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Felix,* 234 Ariz. 118, 317 P.3d 1185, ¶ 19 n.8 (Ct. App. 2014); *State v. Chavez,* 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010); *State v. Rumsey,* 225 Ariz. 374, 238 P.3d 642, ¶ 4 (Ct. App. 2010); *State v. Childress,* 222 Ariz. 334, 214 P.3d 422, ¶ 9 (Ct. App. 2009); *State v. Waicelunas,* 138 Ariz. 16, 20, 672 P.2d 968, 972 (Ct. App. 1983). Based on the above discussion and the above authorities, this Court affirms the trial court's denial of Defendant's motion for mistrial.

The following exchange led to Defendant's attorney's making a motion for mistrial:

> BY [Prosecutor]: You don't—just asking if you do [have to have a certain accuracy level]. You—
>
> A. I have—all mine that I have gotten results back for on all my cases, I have an 88 percent accuracy—
>
> [Defendant's attorney]: Judge, objection.
>
> THE COURT: Nonresponsive.
>
> [Defendant's attorney]: Object to the relevance.

(R.T. of Apr. 11, 2014, at 143.) There are several problems with the actions of Defendant's attorney and the trial court. First, under Rule 103(a) of the Arizona Rules of Evidence, a party making an objection is required to state the specific ground for the objection, which Defendant's attorney did not do at first. Second, the general rule is that only the interrogating attorney has the right to object on the ground that the answer was non-responsive. *Moschetti v. City of Tucson,* 9 Ariz. App. 108, 113, 449 P.2d 945, 950 (1969), and authorities cited therein. Thus, if the answer is otherwise admissible and the attorney asking the question has no objection to the answer, the trial court should not strike the answer. In the present case, Defendant's attorney therefore did not have the right to object to the answer as being non-responsive, and the trial court should not have made that objection on behalf of Defendant's attorney.

The question then is whether the answer was otherwise admissible. Defendant's attorney did state "relevance" as a ground for objection, but a review of the case law shows this evidence was relevant. In *State ex rel. Hamilton v. City Court (Lopresti),* 165 Ariz. 514, 799 P.2d 855 (1990), the court discussed *State v. Superior Court (Blake),* 149 Ariz. 269, 718 P.2d 171 (1986), and clarified the extent to which the State and a witness may present evidence of an HGN test:

> We clarify and reemphasize here that HGN test results, although satisfying *Frye* for limited purposes, are inadmissible to estimate BAC in any manner, including estimates of BAC over .10%, in the absence of a chemical analysis of blood, breath, or urine. In the absence of a chemical analysis, the use of HGN test results, as with observations from other

> field sobriety tests, is to be limited to showing a symptom or clue of impairment. Therefore, in such cases, ***the proper foundation for HGN evidence, although it can be presented before the jury, is limited to describing the officer's education and experience in administering the test and showing that proper procedures were followed.*** The officer may not testify regarding accuracy in estimating BAC from the test, nor may the officer estimate whether BAC was above or below .10%. The officer's testimony is limited to describing the results of the test and explaining that, based on the officer's experience, ***the results indicated a neurological impairment,*** one cause of which could be alcohol intoxication.

165 Ariz. 514, 516–17, 799 P.2d 855, 857–58 (emphasis added; footnote omitted).

> The HGN test satisfies *Frye* for the limited purposes set out in *Blake* and in this opinion. In a case involving only a § 28–692(A) charge, where no chemical test of blood, breath, or urine has occurred, the use of HGN evidence is restricted. Evidence derived from the HGN test, in the absence of a chemical analysis, although relevant to show whether a person is under the influence of alcohol, is only relevant in the same manner as are other field sobriety tests and opinions on intoxication. In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, ***the results indicated possible neurological dysfunction,*** one cause of which could be alcohol ingestion. ***The proper foundation for such testimony, which the State may lay in the presence of the jury, includes a description of the officer's training, education, and experience in administering the test and a showing that the test was administered properly.*** The foundation may not include any discussion regarding the accuracy with which HGN test results correlate to, or predict, a BAC of greater or less than .10%.

165 Ariz. 514, 518–19, 799 P.2d 855, 859–60 (emphasis added). Officer Smith's testimony about his training, education, and experience in administering the HGN test, including the fact that he was 88 percent accurate in his testing, was thus relevant and admissible. That evidence was not subject to exclusion and therefore not a valid basis for a request for a mistrial, thus the trial court properly denied Defendant's motion for mistrial, even though for the wrong reason.

Defendant's attorney also based his motion for mistrial on several exchanges made during Detective Waltermire's testimony, but a review of those instances shows none would support a motion for mistrial. The first was as follows:

> Q. And what does it mean that those [field sobriety tests] are standardized?
>
> A. Those are the ones that show—or reliably show through studies through universities and—
>
> [Defendant's attorney]: Objection, foundation.
>
> THE COURT: Sustained, foundation.
>
> [Prosecutor]: Your Honor, what foundation is lacking?
>
> THE COURT: I'm not going to try your case for you.

(R.T. of Apr. 11, 2014, at 55–56.) Under Arizona law, the objection of "no foundation" is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so that the party offering the evidence can overcome the shortcoming, if possible. *State v. Rodriguez,* 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996); *State v. Guerrero,* 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992); *Packard v. Reidhead,* 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974). It was therefore incumbent on Defendant's attorney to state how the foundation was lacking; otherwise, this was not a proper objection. The trial court later did state how it thought the foundation was lacking, but the prosecutor chose not to pursue this line of questioning, so this evidence was never presented to the jurors. (R.T. of Apr. 11, 2014, at 56, 61.)

The second instance upon which Defendant's attorney based his motion for mistrial was as follows:

> Q. In the course of your career have you—and in the course of your training and your experience have you performed these [field sobriety] tests on people who are impaired and people who aren't?
>
> A. Yes.
>
> Q. What's the difference between those two groups?
>
> [Defendant's attorney]: Objection, foundation.
>
> THE COURT: Sustained.
>
> [Prosecutor]: What's the difference—considering your personal observations what's the difference between the times you've done those tests on people who were impaired and people who weren't?
>
> [Defendant's attorney]: Objection, Your Honor.

(R.T. of Apr. 11, 2014, at 63.) Once the jurors were excused, the trial court stated the basis for the objection: "Yes, I think what you're—again invading the province of the jury with the impairment idea," but did say, "You can ask him the clues and the symptoms." (*Id.* at 64.) In light of the fact that the prosecutor was attempting to have the officer testify about "the clues and the symptoms" of impairment based on his observations of persons who were impaired and persons who were not impaired, it is unclear why the trial court was of the opinion that the prosecutor had not established the necessary "foundation" for the officer's testimony. At any rate, again the prosecutor chose not to pursue this line of questioning, so again this evidence was never presented to the jurors. (*Id.* at 66.)

The third instance upon which Defendant's attorney based his motion for mistrial was as follows:

> Q. . . . Did you reach an arrest decision after you administered the field sobriety tests?
>
> A. I asked him to do a preliminary breath test.
>
> Q. And we'll just move right along past that. After you did that though, did you [arrest him]?
>
> A. Yes.

Q. What did you base that on?

A. Totality and the circumstances as I explained before. There were enough clues and enough indicators showing me that he was impaired—

[Defendant's attorney]: Objection, Your Honor.

THE COURT: Sustained.

[Defendant's attorney]: Move to strike.

THE COURT: Granted. Stricken.

[Prosecutor]: You were telling us about the observations you made consistent with impairment. Please continue.

A. There were enough indicators and clues consistent with impairment that I made the arrest indicating that he was unsafe at the time.

[Defendant's attorney]: Objection, Your Honor. Again move to strike.

THE COURT: Granted, stricken. . . . Ladies and gentlemen of the jury, when the officer is asked of his conclusion as to what it is, that's improper. You get to make the decision as to whether he is impaired or not impaired and you should disregard his opinion as to whether he is or is not impaired.

(R.T. of Apr. 11, 2014, at 82–83.) Again, the trial court's ruling appears to be based on its misconception that an officer may never give an opinion that the suspect was impaired. Moreover, it would seem that any juror with even a modicum of intelligence would be able to figure out that, if an officer arrested a person for driving while impaired, the office must have been of the opinion that the person was impaired. At any rate, the trial court ordered the testimony stricken and instructed the jurors that they must make their own decision whether Defendant was impaired, so again there was no reason to grant a mistrial.

The fourth instance upon which Defendant's attorney based his motion for mistrial was the following exchange dealing with field sobriety tests:

Q. Is there a certain number of boxes that you have to check in order to determine that a defendant is demonstrating signs and symptoms of impairment?

[Defendant's attorney]: Objection. I'll withdraw for now.

A. No.

Q. Why is that?

A. It's a fluid investigation. There's lots of things that go into it, whether the subject is sick, if he's had a head injury, if they're crippled on one leg.

Q. Is there a certain score that a defendant has to get on these tests?

A. No.

Q. Are they pass/fail?

A. Yes.

Q. And—but is that based on a certain score?

A. No.

Q. What is it based on?

A. It's based on the officer's training and experience and the likelihood that they may be impaired.

[Defendant's attorney]: Objection, Your Honor.

THE COURT: Sustained, nonresponsive. Once again ladies and gentlemen of the jury, you are the ones who are going to decide if this Defendant is impaired or not impaired. When the Officer testifies to you that he's impaired, I'm instructing you to disregard that.

(R.T. of Apr. 11, 2014, at 126–27.) Again, the trial court was operating under the misconception that an officer may never give an opinion that the suspect was impaired, and again the trial court ordered the jurors to disregard the testimony and make their own decision whether Defendant was impaired. So again there was no reason to grant a mistrial.

The fifth instance upon which Defendant's attorney based his motion for mistrial was the following exchange dealing with suspects rating themselves on a scale of zero to 10:

Q. Now, we were talking about some of the Defendant's responses to your questions. Based on all of your training and experience doing these tests, asking these questions, have you had—is it common or have you had a suspect tell you he or she is a zero on a zero to ten impairment scale, yet still demonstrate other signs and symptoms of impairment?

[Defendant's attorney]: Objection, Your Honor.

THE COURT: Sustained.

[Prosecutor]: What's the basis for the objection?

[Defendant's attorney]: Foundation. Relevance.

THE COURT: Relevance.

[Defendant's attorney]: 403.

[Prosecutor]: What foundation is lacking?

THE COURT: It's relevant.

(R.T. of Apr. 11, 2014, at 128–29.) In this instance, the prosecutor asked this question after Defendant's attorney had elicited testimony on cross-examination that Defendant said he was zero on a zero to 10 scale and that he was completely sober. Because Defendant's attorney opened the door to this inquiry, the prosecutor was justified in asking this question. The trial court, however, sustained Defendant's attorney's objection so the jurors never heard an answer. This lack of an answer therefore would not support a motion for mistrial.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Defendant's attorney did not make proper objections, and the trial court excluded or precluded evidence that the jurors should have been permitted to hear. More importantly, the jurors never heard any evidence that was not admissible. There was therefore no reason for the trial court to grant a motion for mistrial, thus the trial court did not err in denying Defendant's motion for mistrial.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Arrowhead Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Arrowhead Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 082820151610•

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